

MEMORANDUM OF LAW

DATE: August 27, 1992

TO: Councilmember Bob Filner

FROM: City Attorney

SUBJECT: Bid Requirements for Federally-Funded Projects

We have received your memorandum of August 5, 1992, regarding the award of bids on federally-funded projects. Attached are copies of the two (2) letters we have written in response to inquiries from Ms. Fran Cohen-Butler, Director of the Logan Heights Family Health Center. A further explanation of our position follows.

ANALYSIS

As our office has opined in numerous opinions, the present City policy of rejecting all construction bids where the low bidder fails to make a good faith effort to meet Minority-owned Business Enterprise and Women-owned Business Enterprise ("M/WBE") goals is based upon the mandates of San Diego City Charter section 94. This section requires that contracts be awarded to the lowest responsible and reliable bidder. The California Supreme Court has interpreted the term "responsible and reliable" to preclude consideration of M/WBE compliance efforts. Moreover, we have advised the Council that affirmatively acting to award a contract to the next lowest bidder who has made a good faith effort to comply with the City's M/WBE goals would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A violation of the Equal Protection Clause occurs because the City lacks specific evidence of past discrimination in its jurisdiction which would establish a compelling state interest for taking such action. (See, City Attorney Opinion 84-4, attached for your reference.)

Given the foregoing, we have continued to maintain that in order for the City to pursue its equal opportunity goals in construction contracts where low bidders fail to establish good faith M/WBE efforts, it must rely on the provisions of Charter section 94 which permit the City to "reject any and all bids and readvertise for bids." In the case of a federally-funded project which is administered pursuant to local rules governing M/WBE

participation, this analysis therefore would apply.

With regard to a federally-funded program mandating federal M/WBE participation levels, the equal protection problem does not arise. This is so because the federal M/WBE requirements have been established as remedial measures on the basis of specific evidence of past discrimination. A more fully detailed analysis of the constitutionality of federal M/WBE mandates appears in the attached City Attorney Memorandum of Law dated February 17, 1981. This memorandum demonstrates that the federal M/WBE requirement is a term or condition for receiving certain grant monies pursuant to Charter section 1. Charter section 94 is not at issue. Thus, if a contractor fails to make sufficient good faith efforts under such a federally-funded grant program, then the contractor has not met a term or condition of the contract and the City may go to the next lowest responsible and reliable bidder in order to comply with the federal regulatory scheme.

CONCLUSION

For federally-funded programs which provide for local administration of M/WBE participation, the City may not go to the next lowest bidder when the lowest responsible and reliable bidder fails to meet M/WBE goals. The City must reject all bids and rebid the contract or be subject to a possible equal protection claim. Federally-funded grant programs mandating federal M/WBE levels, however, are not subject to the same equal protection claims when a contract is awarded to the next lowest bidder.

We hope this information will be helpful to you. Should you have any additional questions, please do not hesitate to contact our office.

JOHN W. WITT, City Attorney

By

Kelly J. Salt

Deputy City Attorney

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Attachments

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